Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment	CS Docket No. 95-184
In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring	MM Docket No. 92-260

COMMENTS OF DIRECTV, INC.

James F. Rogers
LATHAM & WATKINS
1001 Pennsylvania Ave, N.W.
Suite 1300
Washington, D.C. 20004-2505
202-637-2200

Counsel for DIRECTV, INC.

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TABLE OF CONTENTS

Page

SUMMARY

In the *Further Notice*, the Commission proposes to revise the rules governing the disposition of one element of inside wiring in multiple dwelling units ("MDUs")—the "home run" wiring that runs from the cable lockbox down a hall or corridor until it reaches the "demarcation point" at which the service provider's wiring ends and the customer-controlled wiring, called the "home wiring," begins. Under the Commission's proposal, an MDU owner could tell an incumbent operator who does not (or will not at the conclusion of the 90-day notice period) have a legally enforceable right to remain on the premises that in 90 days' time the incumbent operator's access to the building will be terminated and the incumbent must either (i) remove the home run wiring; (ii) abandon it; or (iii) sell it to the MDU owner or an alternative MVPD.

The proposed rules fail to take into account several larger issues that must be addressed in order to bring true video competition to MDU residents: First, the Commission must take action to ensure that alternative MVPDs will have access to the MDUs themselves, not just the inside wiring, by ruling in the current "OTARD" proceeding[1] or in this proceeding that an MDU owner must make one or more alternative MVPD services available to building residents, so that the owner will not be the gatekeeper to competition. Second, the Commission should take note of the fact that a number of MVPD services can share the inside wiring, such as DIRECTV and cable. Because consumers should be entitled to select from among as many

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1 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83.

programming choices as possible, the Commission should require sharing of the inside wiring where feasible.

Next, the proposed rules would exclude all those buildings where the incumbent cable operator currently has a contract to provide service, so that even a willing MDU owner could not take advantage of the rules to introduce a competitive MVPD service until the expiration of the incumbent's contract. Thanks to cable's market power, however, in too many cases these contracts are long-term or even perpetual in nature; even where of shorter duration, such a limitation would unnecessarily delay the introduction of cable competition.

The proposed rules themselves have a fundamental shortcoming: in contrast to the rules governing the disposition of cable home wiring, the cable operator would be able to elect to remove the home run wiring without first being required to sell the wiring to the MDU owner or the competitive MVPD provider at nominal cost. Granting the incumbent operator this right would eviscerate the force of the proposed rules, for cable operators could threaten to exercise their removal option—and the inconvenience, nuisance and even disruption of service that would ensue—to chill an MDU owner's consideration of introducing competition into the building. The Commission should, as it has already proposed in this very proceeding, move the demarcation point to the cable lockbox, so that the existing cable home wiring rules could govern the entirety of the wiring dedicated to an individual subscriber's unit. If the Commission retains the existing demarcation point, it should conform the home run wiring rules to the home wiring rules and require the incumbent to offer to sell the wiring to the MDU owner or alternative MVPD provider for salvage value (if the incumbent's contract has expired) or for the wholesale replacement cost without consideration of the cost of installation (if the contract has not yet expired), before the incumbent may elect to remove the wiring. The rules also should clarify that if the incumbent does remove the wiring, it must work with its successor to minimize the cost, inconvenience, and interruption of service that could result from the removal.

Finally, with respect to the Commission's alternate proposals, DIRECTV believes that, with slight revisions, these proposals have some merit. First, the Commission always should allow installation of additional wires by alternative MVPDs in molding or conduit currently occupied by a cable operator, for the incumbent operator cannot and should not have a property right in the space inside the molding or conduit. Second, the Commission should not get mired in determining when a demarcation point is "truly physically inaccessible." Instead, it should recognize that all points behind walls, floors, or ceilings are inaccessible as a practical matter. Third, in order to avoid perpetuating the problems caused by cable ownership of inside wiring, the Commission should require the transfer of ownership of all inside wiring to the MDU owner for all installations commencing after the effective date of the rules.

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DIRECTV, Inc. ("DIRECTV")[1] hereby submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned proceedings.[2]

I. THE INSIDE WIRING ISSUE MUST BE ADDRESSED IN THE BROADER CONTEXT OF ANTICOMPETITIVE PRACTICES WITHIN THE MULTICHANNEL VIDEO PROGRAMMING MARKET GENERALLY

As the Commission and Congress have recognized repeatedly,[3] the goal of widely available competitive alternatives to cable is not yet a reality. Although alternative multichannel

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1 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a Direct Broadcast Satellite ("DBS") licensee, which is a majority-owned subsidiary of HE Holdings, Inc., a Delaware corporation.

2 *Further Notice of Proposed Rulemaking*, CS Docket No. 95-184, FCC 97-304 (Aug. 28, 1997) (*"Further Notice"*).

3 *See, e.g., Further Notice* at ¶¶ 9, 11; *First Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket 92-260, 11 FCC Rcd 4561 (1996), at ¶ 26. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

video program distributors ("MVPDs") such as DIRECTV offer desirable and affordable programming, their offerings are not readily available to all Americans. Residents of multiple dwelling units ("MDUs") frequently are deprived of the opportunity to select an alternative MVPD because the incumbent cable provider enjoys contractual and structural advantages[4] unavailable to its competitors.

In this proceeding, the Commission has proposed rules to try to neutralize the advantage incumbent cable operators enjoy through their ownership of the wiring inside MDUs—wiring that can be replaced only at great cost and with considerable disruption. These proposals, however, are flawed in a number of ways. First, the Commission's proposed rules do not in any way ensure that MDU residents will be able to subscribe to the video service of their choice, or at least be able to choose between two competing providers. Second, the proposed rules do not foster the sharing of inside wiring, which is both technically feasible and economical. Finally, the proposed rules do not even purport to give any relief unless and until the existing cable contract expires—which it may never do.

In addition, by granting the incumbent the right to remove its wiring, the proposed rules grant the incumbent the power to chill an MDU owner's willingness to encourage competition. The rules should provide instead that the incumbent does not have the right in the first instance to remove the inside wiring, but rather must first offer to sell the wiring to the resident, the building owner, or the alternative MVPD at salvage value or, at most, wholesale

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Programming, CS Docket No. 96-133, *Third Annual Report*, FCC 96-496 (Jan. 2, 1997), 12 FCC Rcd 4358, 4367.

4 As the Commission notes in the *Further Notice*, MDU property owners are reluctant to allow alternative MVPDs to install multiple home run wires "for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience and the potential for property damage." *Further Notice* at ¶¶ 25-26. Customer choice, the engine of competition, has suffered as a result of the MDU owners' concerns.

replacement cost. Only if these parties have declined the offer should the incumbent have the right to remove the wiring.[5]

A. The Commission Should Ensure That Alternative MVPDs Can Gain Access To All MDUs

At the outset, the Commission should take note that its proposals address only how an alternative MVPD might gain access to the wiring inside the building. But to give a competitor access to inside wiring is only half the battle. The proposed rules do not come into play unless the MDU owner wants to bring video competition into the building. It provides no relief for the resident who wants to subscribe to DIRECTV but whose building owner does not wish to disrupt its cozy relationship with the cable provider.

The provider needs to be able to bring its programming into the building —typically by placing a single antenna on the rooftop or other suitable location—in order for the inside wiring to be of any value whatsoever. In the Commission's current proceeding to implement the Congressional mandate of Section 207 of the Telecommunications Act of 1996[6] to preempt restrictions that impair a viewer's ability to receive video programming services through over-the-air reception devices (the so-called "OTARD" proceeding),[7] the Commission already has struck down municipal ordinances and private agreements that restrict a viewer's ability to

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5 This structure, where the incumbent does not have the right to remove without first offering to sell the wiring at nominal cost, is the very one the Commission has employed since 1993 for a related piece of inside wiring, the "home wiring." *See* Section IV. B, below.

6 Telecommunications Act of 1996, § 207, Pub. L. No. 104-104, 110 Stat. 56 (1996), *reprinted in* 47 U.S.C.A. § 303 note (1997) (Restrictions on Over-the-Air Reception Devices) (the "1996 Telecommunications Act").

7 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83.

install a DBS, MMDS or broadcast antenna. With regard to MDU residents, however, the Commission has provided relief only to unit owners who have exclusive access to areas suitable for antenna installation, such as a south-facing patio or balcony.[8] The Commission should extend that protection to similarly situated renters as well.

Currently in the OTARD proceeding, the Commission is considering ways in which it can ensure that a DBS operator will be able to obtain access to an MDU rooftop to be able to provide service to residents who do not have a balcony or patio suitable for antenna installation. DIRECTV and others have proposed that the Commission require a building owner to make available to residents one (or more) alternative MVPDs.[9] The Commission must take prompt action to implement such a policy if the inside wiring proceedings are to jump-start video competition in MDUs. DIRECTV welcomes swift action on the inside wiring issues as addressed below, but cautions the Commission that to act here without providing companion relief in the OTARD proceeding will mean that thousands of MDU residents will continue to be frustrated in their desire to receive alternative programming.

B. The Commission Should Encourage the Sharing of Inside Wiring, Where Feasible, to Maximize the Choices Available to MDU Residents

Integrally related to this proceeding is the question whether multiple providers can coexist on a single, shared wire. DIRECTV has previously expressed its view to the Commission that such sharing is technically feasible, economical, and desirable from a policy perspective.[10] As explained by Robert J. Rothaus, Project Manager, Multi-Unit Systems,

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8 *See* 47 C.F.R. § 1.4000 (1996).

9 *See, e.g.,* Ex parte comments of DIRECTV, Inc., IB Docket No. 95-59 *et. al.*, (filed February 12, 1997).

10 *See* Ex Parte Comments of DIRECTV, Inc., CS Docket No. 96-184 *et. al.* (filed April 28, 1997).

DIRECTV, because cable television and DIRECTV signals occupy different frequency spectrums, a single cable wire can simultaneously carry both signals.[11] Currently, among DIRECTV subscribers who have cable television available to them, nearly forty percent receive both services, and in many cases, use a single wire to enjoy both DIRECTV and cable programming on the same television set.[12] Two "diplexers" are used to separate the cable and DIRECTV signals at the end of the home run of a joint cable/DIRECTV subscriber.[13]

The proposals in this proceeding assume that a resident may subscribe to only one service at a time. Although the Commission has indicated that it does not wish to receive comments in response to this *Further Notice* relating to the shared wire issue,[14] DIRECTV urges the Commission to initiate a proceeding on sharing or to expand this proceeding to embrace the sharing issue. Clearly the ability to receive cable, DIRECTV or both offers consumers the highest level of choice and flexibility,[15] especially for MDU residents who historically have never had the opportunity to determine the source of their television entertainment. The Commission should mandate that the incumbent cable operator must share the inside wiring with another provider of the MDU owner's choice. Moreover, the incumbent should not be compensated for such joint use because there will be no taking of its property.

C. The Commission Should Permit an MDU Owner to Introduce Competitive Service at Any Time, Not Only Upon the Expiration of an Existing Contract

The Commission's proposal to address the disposition of inside wiring only in those buildings where the incumbent provider "no longer has an enforceable legal right to remain

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11 *See* Declaration of Robert J. Rothaus, attached hereto as Exhibit A ("Rothaus Dec.").

12 *See* Rothaus Dec. at ¶ 5.

13 *Id.* at ¶ 4.

14 *Further Notice* at ¶ 3.

15 *See* Rothaus Dec. at ¶ 6.

on the premises"[16] is a fundamental mistake. In far too many cases, cable operators have used their market power to extract from MDU owners long-term or even perpetual contacts that automatically renew with the renewal of the cable operator's franchise. By imposing this limitation on the proposed framework, the Commission ensures that the cable industry will continue to experience only limited competition. Even if a contract has "only" three years remaining, for example, that is far too long a period for consumers to have to wait and is an eternity for MVPD competitors in this quickly evolving marketplace.

If the Commission hopes to use this rulemaking to permit residents of MDUs to choose between alternative MVPDs, it must permit MDU residents to choose their MVPD freely, irrespective of whether MDU owners currently are locked into contracts with incumbent cable operators. Now that alternatives to cable are widespread, MDU owners must at least be permitted, if not required, to offer their residents a choice of MVPDs. Cable operators extracted these long-term contracts by exploiting market power that no other service providers enjoy.

Therefore, the Commission should provide that the MDU owner may at *any* time give the incumbent cable operator 90 days' notice that its right to exclusive use of the inside wiring will be terminated. The Commission possesses the authority to adopt such a regulation by virtue of the 1996 Telecommunications Act, the 1992 Cable Act and the 1934 Communications Act. In the first two laws, Congress expressly embraced a competitive MVPD environment and called upon the Commission to adopt rules to achieve that goal quickly.[17] Moreover, Section 4(i) of the Communications Act grants the Commission expansive authority to adopt regulations "not inconsistent with the Act, as may be necessary to the effective performance of the Commission's

16 *Further Notice* at ¶ 34.

17 *See* 1996 Telecommunications Act, § 207; Cable Television Consumer Protection and Competition Act of 1992, ("1992 Act"), 47 U.S.C. § 543(a).

functions."[18] The Commission should use this authority to enable an MDU owner to give notice to the incumbent cable provider at any time, whether or not there is then an existing contract in force, that the cable operator's right to exclusive use of the inside wiring will be terminated .[19]

II. THE COMMISSION'S PROPOSED RULES FALL SHORT OF WHAT IS NEEDED TO BRING COMPETITION TO THE MARKET FOR MULTICHANNEL VIDEO PROGRAMMING

Competition will lag in the market for multichannel video programming until MDU owners and alternative providers of video services are assured that an incumbent cable provider's wiring will remain in the walls after it vacates the premises. Replacing the existing cable wiring is disruptive and inconvenient to the building's residents, costly for the competitor and inefficient for the public. By allowing incumbents to remove the wiring, or at least threaten to do so, the Commission unwittingly enables them to continue to thwart competition for the provision of video services in MDUs.

Assuming an alternative MVPD can gain access to a building, it needs to use a complete set of wires to be able to deliver its service to residents. Three discrete and identifiable segments comprise the "inside wiring" used to deliver video programming signals within an MDU. The "riser cable" or "feeder line" serves as the source of the signal for the MDU and carries the signal from rooftop or basement to all floors. The "home run" wiring is dedicated to a single unit and carries the signal to the subscriber. The home run connects to the riser cable at a point known as the "tap."[20] Finally, the "home wiring" is "the internal wiring contained within

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18 1996 Telecommunications Act, § 207.

19 Bear in mind, however, that contracts entered into by alternative MVPDs, which do not have market power, are not anticompetitive, and should provide guaranteed access to the building for the duration of their terms.

20 Multiple taps are usually located in a single point of entry, know variously as the "security box" or "lockbox."

the premises of a subscriber which begins at the demarcation point, not including any active elements such as amplifiers, converter or decoder boxes, or remote control units."[21] Currently, the "demarcation point"—the point at which a service provider's system wiring ends and the customer-controlled wiring begins[22]— is defined as the point twelve inches outside of where the cable wire enters the subscriber's individual dwelling unit.[23]

A. The Proposed Framework

In the *Further Notice*, the Commission proposes to adopt a framework whereby an incumbent service provider which no longer has the right to remain on the premises of an MDU may elect to dispose of its home and home run wiring in one of three ways: (1) removal of the wiring; (2) sale of the wiring to the MDU owner or the new provider; or (3) abandonment of the wiring.[24] As set forth in more detail below, the procedure proposed in the *Further Notice* for the disposition of the home run wiring differs in one fundamentally important respect from that which the Commission has successfully employed for the last few years to govern the disposition of the *home* wiring (that portion generally within the subscriber's unit): in the home wiring context, the incumbent operator may not remove the wiring until it has first offered that wiring to the resident at a nominal per-foot cost, equal to the replacement cost of the wire itself without charge for installation cost. If on the other hand, as the Commission proposes, the cable operator is allowed to elect to remove the wiring without being required to offer it first for sale to the MDU owner or competitive MVPD at nominal cost, the Commission's desire to introduce video competition into the MDU market will be frustrated.

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21 47 C.F.R. § 76.5(ll).

22 *Further Notice* at ¶ 6.

23 47 C.F.R. § 76.5(mm)(2).

24 *Further Notice* at ¶¶ 35, 39.

B. The Commission Should Move The Demarcation Point To The Lockbox Or, In The Alternative, Apply The Rules It Adopted In 1993 To The Home Wire And Forbid The Cable Operator From Removing Its Home Run Wiring Without First Offering It For Sale

DIRECTV reaffirms its support for the Commission's original proposal, made in the *Inside Wiring Notice,*[25] to move the demarcation point to the cable lockbox, which would make the home run wiring part of the home wiring.[26] The reason the Commission gave for that proposal, "to promote competition both in the markets for multichannel video programming delivery and in the market for telephony and advanced telecommunications services,"[27] is as compelling now as it was last year when it was proposed by the Commission. Although the Commission has stated its desire to defer its resolution of this matter to a future proceeding, DIRECTV urges the Commission to tackle this crucial issue now. In the context of the Commission's present proposals, a change in the demarcation point would dispose of the need to distinguish between the home run and home wiring and would avoid the problems inherent in the removal option. The solution to the inside wiring issue is as simple as moving the demarcation point.

If the Commission chooses not to move the demarcation point, at least at this time, at a minimum it should apply to the *home run* wiring the rules the Commission adopted pursuant to section 16(d) of the 1992 Cable Act to govern the disposition of the *home* wiring.[28]

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25 *Notice of Proposed Rulemaking*, CS Docket No. 95-184, 11 FCC Rcd 2747 (1996)("*Inside Wiring Notice*").

26 *Id.* at 2756-57.

27 *Id.*

28 In that law, Congress required the Commission to adopt rules regarding the disposition of wiring within the cable subscriber's home after the subscriber terminates service. 47 U.S.C. § 544.

Those rules,[29] which govern the disposition of the home wiring when a subscriber voluntarily terminates service, require that before the cable operator may remove its home wiring it first must offer to sell it to the subscriber at the replacement cost of the wire priced on a per-foot basis.[30]

As the Commission found in its rules implementing the 1992 Cable Act, fair compensation in the home wiring context is the replacement price of the coaxial cable.[31] Incumbent cable operators may argue that any compensation formula or default price must take into account the costs they incurred in installing the wiring. Just as it did in adopting the 1993 rules, the Commission should again reject this argument. As the Commission pointed out there:

> [W]e will not allow the system operator to collect for the cost of labor involved in the installation of the cabling as opposed to the physical plant itself. This is not a salvageable expense if the cable were removed nor can we conclude that there was a reasonable expectation that compensation would be received for it above and beyond any installation charge that has already been levied.[32]

Thus, if the cable operator is tendering its inside wiring at the conclusion of its contract term, the replacement price should be defined as the salvage value of the cable wire. If, however, the offer

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29 *Report and Order*, MM Docket No. 92-260 (Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring), 8 FCC Rcd 1435 (1993) (*"Cable Wiring Order"*).

30 *Id.* at 1438.

31 47 C.F.R. § 76.802(a)("a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase the wiring at replacement cost, and the subscriber declines"). As the Commission noted in the *Inside Wiring* proceeding, the replacement cost is the cost of the wire itself: "We would expect any charge per foot to be based on the replacement cost of coaxial cable in the community. For example, the record indicated that new coaxial cable is being sold for six cents per foot by District Cablevision in Washington, D.C." *Inside Wiring Rules*, 8 FCC Rcd. at 1438 n. 39 (citation omitted).

32 *Id.*

to purchase the inside wiring comes at any other time, the replacement price is best defined as the wholesale replacement cost of the cable wiring.

Because the home wiring rules allow the incumbent to sell its wiring for just compensation, there is no unconstitutional taking. In the nearly five years since those rules were adopted, there have been no successful challenges to the Commission's finding that replacement cost constitutes just compensation for the wiring. The Commission should establish the compensation rates for the rest of the incumbent provider's inside wiring in the same fashion: the Commission should provide that the sale price for the wiring to the MDU owner or alternative MVPD shall be the salvage value (if at or after the end of the contract term) or the wholesale market price (if before the end of the contract term) of the wiring.[33]

The home wiring rules have provided a workable solution for this important piece of wiring, a solution that does not permit the cable operator to rip out, or threaten to rip out, the wiring. As discussed below, if the Commission rejects DIRECTV's urging that it relocate the demarcation point to the lock box, it should apply the same policy as it adopted in the *Cable Wiring Order* to the other elements of the wiring that an MVPD needs to offer its services to residents in MDUs, so that an incumbent cable operator will not have the right to remove the home run wiring unless and until the MDU owner and the alternative MVPD providers have both declined the opportunity to purchase that wiring at the replacement price.

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33 The Commission also has proposed to give the MDU owner and alternative MVPDs the right to purchase the *home* wiring (a right that is currently limited to the subscriber). *Further Notice* at ¶¶ 77, 79. DIRECTV supports this proposal.

C. The Prospect That A Cable Operator Might Remove Its Wiring Will Deter An MDU Owner From Even Considering The Replacement Of The Incumbent With An Alternative MVPD

Although the *Further Notice* seeks to create a predictable mechanism for disposing of the home run wiring, the proposed rules ignore the potential for anticompetitive mischief inherent in the removal option. Much of the Commission's reasoning seems to be predicated upon the assumption that in the short term, economically motivated incumbents are unlikely to remove their home run wiring because most of it, particularly in newer buildings, is embedded within the structure of the building itself and hence the cost of removing the wiring greatly exceeds its salvage value. As a corollary to this assumption, a cable operator would appear to be unable to issue a credible threat to remove its wiring. Viewed through the eyes of an incumbent cable operator facing the possibility of competition, however, the removal option appears in a different light. Disruption of video service and damage to the physical structure of the MDU, as well as the general inconvenience and unpleasantness that will accompany the removal of home run wiring, will strongly discourage an MDU owner from switching providers or electing to permit head-to-head competition within the building. Knowing this, and desiring to retain its monopoly over video service inside the property, the incumbent cable provider will have an incentive to threaten to remove the home run wiring and, if necessary, to remove its wiring on one or more occasions in order to make its future threats credible.

The *Further Notice* obliquely addresses this issue by inquiring whether a penalty should be levied upon an incumbent MVPD that initially elects to remove its home run wiring but subsequently decides to abandon it.[34] Although there indeed must be a monetary penalty imposed upon an incumbent acting this way, the penalty is ineffective in the case of a cable

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34 *Further Notice* at ¶ 36.

operator who intends to remove the wiring for the *in terrorem* effect that the removal will have on other MDU owners. Moreover, the penalty might not be imposed until *after* the new provider has already wired the building.[35]

Most important, however, is that the very existence of the removal option (without the requirement of first offering to sell the wiring at nominal cost) will tend to dissuade an MDU owner from even electing to change providers in the first place and will encourage it to change the election at the first threat of removal. Before an MDU owner formally notifies an incumbent provider that it intends to terminate service or open its building for competition, it will informally discuss its inclination with the incumbent. If the proposed rules give the incumbent the option to remove its wiring, it will threaten to assert this right whether or not it has any intention of following through with its threat. This threat likely will cause the MDU owner to rethink its initial decision to switch providers. To ensure that an MDU owner will respond to its residents' demands for a choice between MVPDs, the Commission must eliminate the removal option from its rules.

Thus, the initial error in the Commission's framework is to give the incumbent provider the option of removing the home run wiring. The Commission's rules should initially limit the incumbent to two options: abandonment of the wiring or its sale at a nominal rate. Only if the offer for sale is declined should the incumbent have the right to remove the wiring. Limiting the incumbent provider in this way ensures that it will not employ the removal option strategically as a weapon to preclude a switch of providers in the first place.

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35 *See* Section IV. D below, for ways to minimize the risk of service interruption and duplicative installation.

D. The Rules Must Ensure That The Incumbent Cable Operator Will Not Sabotage The Wiring Or Disrupt The Continuity Of Service

If, despite the serious problems outlined above, the Commission does choose to permit the incumbent to remove the wiring without first offering it for sale at nominal cost, it must more effectively address the disruption of service that could ensue. This prospect provides yet another incentive for the MDU owner to maintain the status quo. An MDU owner will not provide its residents with a choice of MVPDs if that means they will go for periods of time with no multichannel video programming service. The Commission's rules, however, create the risk that an MDU owner changing MVPDs, or opening its building to competition, will leave its residents without service during the transition, a significant incentive for MDU owners to maintain the status quo. Therefore, if the Commission chooses to permit the incumbent to have the right to elect to remove its wiring, it must take steps to ensure that multichannel programming service is maintained. The notification and election schedules proposed in the current rules contain no provisions protecting residents and MDU owners against service breaks during the transition from the old provider to the new one. Thus, several modifications to the proposed framework are desirable.

First, the rules need to define "removal" so that the incumbent cable operator is precluded from simply sabotaging its wiring, such as by cutting wires at a few strategic points, and thus making it impossible for a subsequent provider to install new wiring. Thus, where the incumbent operator elects to remove its wiring, it must remove the home run wiring in its entirety and in such a manner that new home run wiring can be readily connected to the lockbox and the home wiring. Second, the incumbent provider must be required to coordinate its removal of the home run wiring with the MDU owner. This will minimize service disruptions and, more importantly, allow the new provider to lay new wiring *before* the incumbent removes its old wiring. Although the Commission recognizes that an incumbent that removes its home run wiring must also restore the building to its original condition,[36] restoration should not occur until the new home run wiring is installed. This will ensure that service and restoration disruptions are kept to a minimum and will provide the needed incentive for the MDU owner to welcome alternative MVPDs to its building. Moreover, in the event that the parties are not able to coordinate the replacement seamlessly, and the incumbent completes its removal before the new MVPD is ready to install the replacement wiring, the regulations should require the incumbent to quit the premises and permit the MDU owner itself to restore the building to its original condition, charging the owner's reasonable restoration costs back to the former provider.

III. COMMENTS ON THE COMMISSION'S ALTERNATIVE PROPOSALS

The Commission also has requested comments on the following alternatives to the proposed framework: (1) allowing alternative MVPDs to install their wiring within existing molding or conduit;[37] (2) moving the demarcation point if the inside wiring is "truly physically inaccessible;"[38] and (3) transferring ownership of the home or home run wiring to the MDU owner upon installation for contracts entered into after the effective date of the proposed rules.[39]

A. The Rules Should Permit a Second Wire to Be Installed Within Existing Molding or Conduit

To the extent that an MDU owner invites an alternative provider to install its wiring within existing molding or conduit, the incumbent provider should be powerless to prevent it, even if it has a contract that purportedly grants it the right to exclusive use of the molding or conduit. The incumbent provider is not the "owner" of the empty space enclosed within the molding or conduit and surrounding its own wiring. As such, the incumbent has no

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36 *Further Notice* at ¶¶ 38-39.

37 *Id.* at ¶ 83.

38 *Id.* at ¶ 84.

39 *Id.* at ¶ 85.

right to exclude another provider from that space, and thus a rule permitting an alternative MVPD to utilize this area would not constitute a regulatory taking.[40] The Commission should adopt such a rule to facilitate the installation of multiple wires when MVPDs find such installation desirable.

B. The Demarcation Point Should Never be Located Behind a Wall, Ceiling or Floor

The Commission's proposal to move the demarcation point when it is "truly physically inaccessible" raises more issues than it solves. The Commission should not involve itself in the inexact process of determining whether wiring is "truly physically inaccessible," but should instead recognize that all wiring inside walls, ceilings or floors is effectively inaccessible. Thus, the Commission should place the demarcation point at a location that is always accessible irrespective of the nature of the building—at the lockbox. If the Commission goes forward with this proposal, it should explicitly define "truly physically inaccessible" to encompass any instance where the demarcation point is not in an open, common space, but is behind any wall, floor, ceiling, or other structural component. Such a definition will avoid the need for the Commission to involve itself in making case-by-case determinations of whether the wiring is "truly physically inaccessible."

C. The Commission Should Require That Ownership of Home Run and Home Wiring be Transferred to The MDU Owner in All Future Installations

The Commission recognizes that alternative MVPDs must have access to the cable wiring within MDUs if MDU residents are to enjoy the benefits of video competition. The unfortunate predicament now confronting alternative service providers and MDU owners that would like to provide their residents with a choice of service providers is the direct result of the

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40 *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982).

Commission's decision to place the demarcation point twelve inches outside an individual subscriber's unit rather than at the readily accessible lockbox. Recognizing this, the Commission proposes that henceforth the MVPD that installs its wiring within a building will be required to transfer ownership of the wiring upon installation to the MDU owner.[41] This proposal would not solve the problem for buildings that are already wired, but it would remove an important impediment to competition in buildings that have yet to be wired. If the proposal is adopted, the Commission could leave the price of the wiring to private negotiations because both the installing provider and the MDU owner would have every incentive to reach an agreement. Both of them want the provider to begin offering service as quickly as possible and thus negotiation over the value of the home and home run wiring should occur without difficulty.

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41 *Id.* at ¶ 85.

CONCLUSION

The proposed rules should be revised in a number of ways. Most fundamentally, the demarcation point should be moved to the cable lockbox. This is the simplest way to address the inside wiring issue. If the Commission does not move the demarcation point, the Commission should not allow the incumbent to remove the wiring unless it has first offered to sell the wiring to the MDU owner or the alternative MVPD at salvage value (if the incumbent's contract has expired) or wholesale replacement cost (if the contract is still in force) and the MDU owner and the incumbent MVPD have declined the offer. In addition, the rules should permit an MDU owner to make the decision to replace an incumbent cable operator at any time, not only when the cable operator no longer has a contract to remain in the building.

Moreover, the rules should prohibit sabotage if wiring is to be removed, require coordination between the incumbent and its replacement to avoid any interruption of service to residents, encourage sharing of wiring where feasible, and permit installation of competing wires within molding and conduit. Finally, the Commission also should adopt rules to ensure that alternative MVPDs have access to the exterior of MDUs so as to enable them to install the antennas necessary to bring programming into the building. If the Commission adopts these provisions, it will have truly enhanced the prospects for video competition in MDUs.

Respectfully submitted,

James F. Rogers
LATHAM & WATKINS
1001 Pennsylvania Ave, N.W.
Suite 1300
Washington, D.C. 20004-2505
202-637-2200

Counsel for DIRECTV, Inc.

September 25, 1997

DECLARATION OF ROBERT J. ROTHAUS

I, Robert J. Rothaus, on behalf of DIRECTV, Inc. ("DIRECTV") hereby declare as follows:

1. I am Project Manager, Multi-User Systems, for DIRECTV. In that position, my responsibilities include designing systems for distribution of DIRECTV in apartment buildings and other multi-user buildings.

2. I have bachelor's and master's degrees in engineering. I have been a practicing electrical engineer for 15 years.

3. DIRECTV signals and cable television ("CATV") signals can be carried simultaneously by a single cable wire. Most CATV systems operate between 54 and 806 MHz. DIRECTV signals are carried at between 950 and 1450 MHz. Thus, because these signals occupy different frequency spectrums, a single cable wire is able to carry both signals.

4. Outfitting a single piece of wire to carry simultaneously both DIRECTV and CATV signals is as simple as installing a small and inexpensive piece of equipment termed a "diplexer" at the start of a home run to combine the signals and a second diplexer at the end of the home run to separate the signals for use by a joint DIRECTV/cable customer. The diplexer combines or separates the two signals and, additionally, contains filters that block the signals from interfering with one another.

5. Currently, among DIRECTV subscribers who have cable television available to them, nearly forty percent receive both services, and in many cases, use a single wire to enjoy both DIRECTV and CATV programming on the same television set.

6. It is not surprising that some consumers would like to subscribe to DIRECTV and cable simultaneously since these two technologies often offer consumers different types of programming and service options. Cable, for example, provides local access and local origination programming that DIRECTV typically does not carry, while DIRECTV offers a large variety of out-of-market programming and movie options that are not available through franchised cable operators.

I declare that the above statements are true and correct to the best of my knowledge, information and belief.

Executed on this 24th day of September, 1997 at El Segundo, California.

Robert J. Rothaus
DIRECTV, Inc.